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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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In the Matter of )  
)  
Implementation of Section 304 of the ) CS Docket No. 97-80  
Telecommunications Act of 1996 )  
Commercial Availability of )  
Navigation Devices )

To: The Commission

**OPPOSITION OF COMPUTER INDUSTRY GROUP  
TO PETITION FOR PARTIAL RECONSIDERATION  
FILED BY TIME WARNER ENTERTAINMENT COMPANY**

Apple Computer, Inc.  
ATI Technologies, Inc.  
Compaq Computer Corporation  
Hewlett-Packard Company  
Intel Corporation  
The Information Technology Industry Council  
International Business Machines Corporation  
Mediamatics, Inc.  
Microsoft Corporation  
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September 23, 1998

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The Computer Industry Group<sup>1</sup> ("Computer Group"), by its attorneys, hereby submits its Opposition to the Petition for Partial Reconsideration filed by Time Warner Entertainment Company, L.P. ("Time Warner") in the above-captioned docket.<sup>2</sup>

**I. INTRODUCTION**

The Computer Group files only in opposition to so much of Time Warner's Petition that requests that:

"theft of service," as that term is used in Section 76.1201 and 76.1209, includes any device which can be used to defeat or assist in defeating copy protection

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<sup>1</sup> The Computer Group is an ad hoc group consisting of Apple Computer, Inc., ATI Technologies, Inc., Compaq Computer Corporation, Hewlett-Packard Company, Intel Corporation, the Information Technology Industry Council, International Business Machines Corporation, Mediamatics, Inc., Microsoft Corporation, ST Microelectronics, Inc., and Zoran Corporation. For over the past two years, the Computer Group has worked with both the movie studios, including Time Warner, and the consumer electronics industry in an effort to create an inter-industry solution to copy protection for video on Digital Versatile Disks.

<sup>2</sup> Implementation of Section 304 of the Telecommunications Act of 1996 Commercial Availability of Navigation Devices. **Report and Order**, CS Docket No. 97-80, released 1998 (rel. June 24, 1998) ("*Order*").

techniques employed by **program producers** or **copyright holders**. (Emphasis supplied.)<sup>3</sup>

The Computer Group strongly supports protection for copyrighted materials, including video programming. The Computer Group understands Time Warner's desire to protect copyrighted materials transmitted by Multichannel Video Programming Distributors ("MVPD's") from unauthorized copying. Nevertheless, Time Warner's proposal would have severe unintended consequences. Grant of the seemingly simple request would result in: (a) requiring the Commission to resolve complex copyright issues for which it has neither the authority nor a sufficient record to act; (b) prohibiting all programmable devices, and perhaps others, from participating in the navigation device market; and (c) requiring the Commission to intervene in an area where various industry members are diligently working on copy protection methods that may obviate the need for government intervention or if, after such methods are fully developed, require only narrowly crafted law or regulation.

## **II. THE COMMISSION SHOULD REFRAIN FROM REGULATION OF COPYRIGHT PROTECTION TECHNOLOGIES**

The Commission should refrain from enacting rules that would potentially require it to regulate copyright protection technologies and the use of devices that are capable of defeating or assisting in defeating those technologies because it is without the legislative authority to do so and because the matter is already the subject of separate legislative initiatives. A device that

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<sup>3</sup> Time Warner Petition for Reconsideration at 14. The Computer Group does not take a position with respect to any other portions of Time Warner's Petition.

defeats a method of copy protection is not a device engaged in the theft of service from an MVPD. It is not a device engaged in the theft of services from a MVPD. Rather, if the material protected by the copy protection method is copyrighted, such a device would permit the lawful recipient of the MVPD's services to violate the Copyright Act<sup>4</sup> by making an illegal copy. No services have been stolen from the MVPD. Rather, the copyright holder may have a copyright infringement cause of action against the individual making the illegal copy and, under certain circumstances, against the manufacturer of the device under the theory of contributory infringement.<sup>5</sup>

Under the WIPO Performance and Phonograms Treaty finalized in December of 1996, the U.S. has committed to implement legislation intended to preclude the unlawful use of devices that circumvent copy protection technologies. The WIPO implementing legislation<sup>6</sup> has been the subject of extensive and heated discussions in Congress. In the current version of the proposed WIPO implementing legislation, which has been passed by the House, a painstakingly negotiated anti-circumvention provision has been agreed upon. The Commission should avoid adopting rules that may conflict with the standards set forth in the WIPO implementing legislation. Therefore, even assuming that the Commission has a legislative mandate to act in this area, a point which the Computer Group does not concede, it is clearly premature for the Commission to adopt a set of rules that would ban "circumvention devices."

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<sup>4</sup> 17 U.S.C. §101, et. seq. (1996).

<sup>5</sup> See *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

<sup>6</sup> Digital Millennium Copyright Act, H.R. 2281, 105<sup>th</sup> Cong. (1998).

Time Warner has failed to cite any legislative authority that would authorize the Commission to act in this area. In fact, the Commission has recognized that Congress often asks it to act in regard to the transmission signal, but not in regard to the content being transmitted. In its Report and Order implementing the must carry and retransmission consent provisions of the 1992 Cable Act, for example, the Commission recognized the distinction between transmission rights and copyrights.<sup>7</sup> Citing the Senate Report, the Commission noted “Congress made clear that copyright applies to the programming and is thus distinct from signal retransmission rights.”<sup>8</sup> The Commission further acknowledged its adherence to this concept, stating “[j]ust as Congress made a clear distinction between television stations' rights in their signals and copyright holders' rights in programming carried on that signal, we intend to maintain that distinction as we implement the retransmission consent rules.”<sup>9</sup> The same distinction applies to transmission over cable. Protecting content sent to consumers by MVPDs presents an issue that is distinct from protecting MVPDs from signal theft. The Commission has been delegated the authority to regulate in order to protect the MVPD signal from theft. The Commission should recognize, however, that Congress' delegation of authority does not extend to regulating protection of the content of that signal from unauthorized copying by consumers.

Nevertheless, if the Commission feels compelled in the navigational device arena to adopt rules relating to copy protection technologies without an explicit Congressional mandate, it

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<sup>7</sup> Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Report and Order, MM Docket No. 92-259 (March 29, 1993) at ¶ 173.

<sup>8</sup> *Id.*, (citing Senate Committee on Commerce, Science, and Transportation. S. Rep. No. 92 (“Senate Report”), 102d Cong. 1st Sess. (1991) at 36.)

<sup>9</sup> *Id.*

should do so only upon a fully developed record. Time Warner's Petition contains only a single paragraph relating to its argument that the Commission should "clarify" that theft of service should include attempts to defeat copy protection technologies.<sup>10</sup> Time Warner fails to establish any legal basis for the Commission to act or any clear parameters concerning the types of copy protection systems that would be implicated.

### **III. GRANT OF TIME WARNER'S REQUEST WOULD BAR PROGRAMMABLE COMPUTERS FROM ATTACHING TO CABLE NETWORKS**

Time Warner would have the Commission prohibit the attachment of any device that "can be used to defeat or assist in defeating copy protection techniques."<sup>11</sup> Time Warner suggests that this change would be a "clarification" of the Commission's Order. Such a change would, however, dramatically alter the impact of the Order on manufacturers of programmable devices, such as personal computers.

In the digital world, robust protection methods often rely on some type of encryption, while less robust methods may include a digital indication that a particular work is not to be copied.<sup>12</sup> Computers are almost always used in any attempt to defeat cryptography programs, and virtually any copy protection system will be a digital technology naturally susceptible to attack

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<sup>10</sup> Time Warner at 14.

<sup>11</sup> Id.

<sup>12</sup> More simplistic "flag" types of copy protection might actually be invisible to a computer if they are designed for strictly consumer electronics devices. As a result, computers that fail to recognize any such protection measures would be precluded from attaching to MVPD networks. *See, e.g.,* the Digital Home Recording Act, 17 U.S.C. Sec. 1001, et seq., which excludes programmable computers from its coverage for similar reasons.

by a program run on a programmable computer. Thus, simply by basic nature of operation, the computer would be swept out under the Time Warner proposal.

On the one hand, Time Warner's proposal could be read to mean that all computers and other programmable devices would not be permitted to attach to MVPD networks since by their nature they are devices that "**can** be used to defeat or assist in defeating copy protection techniques employed by program producers or copyright holders."<sup>13</sup> In this regard, it is noteworthy that Time Warner has in other contexts such as the WIPO implementing legislation acknowledged that language excluding devices that "can be used" to circumvent is overreaching.

On the other hand, Time Warner's proposal may be intended to exclude only those devices that fail to recognize or abide by the rules embedded in particular copy protection techniques. Even this more narrow reading creates a completely unreasonable standard when applied to personal computers since, as noted above, there is no limit on the number or types of copy protection techniques covered by the proposal. In fact, there could be as many different types of techniques as there are content providers; consequently, compliance literally could be impossible as a result of incompatible standards.<sup>14</sup> Moreover, consumers could purchase a device which would be lawful one day and unlawful the next since a content provider could at any time employ a new technique not recognized by the device.

The need for a self-enforcing industry standard is precisely the reason why the Computer Group has been working with content providers, including Time Warner, and the consumer

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<sup>13</sup> Time Warner at 14 (emphasis added).

<sup>14</sup> Company A, for example, could say if bit number 010111 is set as a one then do not copy. Company B, on the other hand, could say if bit number 010111 is set as a zero then do not copy.

electronics industry to create copy protection methods that rely on self protecting content, i.e., encrypted content that is difficult for the ordinary user to copy. The Order is in other instances expressly premised on the assumption that commercial interests will result in necessary standard setting processes and that assumption is equally valid in the area of copy protection technologies.<sup>15</sup>

#### **IV. THE VARIOUS INDUSTRIES ARE WORKING ON PROTECTING DIGITALLY TRANSMITTED WORKS**

The Computer Group was formed to work with content providers and consumer electronics companies to develop a copy protection method used in connection with Digital Versatile Disks.<sup>16</sup> The original proposal for protecting movies on DVD was similar to Time Warner's proposal in that it called for a legislatively mandated solution. That proposal, however, also would have mandated a uniform, albeit technically flawed, form of copy protection. The computer industry objected to the approach but offered to work in a technical group to create a relatively robust method of protecting DVD movies from consumer copying. On the legal front, the industries are working to form an inter-industry "DVD Copy Control Association" to maintain and enforce the copy protection system. Moreover, the same industry groups are committed to working on methods to secure digital transmissions from a DVD Player or

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<sup>15</sup> Order at 9.

<sup>16</sup> In some respects, DVD is very similar to DTV. Movies are converted from film to MPEG-2 files and "pressed" onto a disk the same size as a CD disk, but with far more capacity. DVD Players or Personal Computers with DVD-ROM drives are able to play those movies back by transmitting the pictures to a television set or a computer monitor.



computer to a digital display.<sup>17</sup> It may very well be possible that one of the methods of securing digitally transmitted video (IEEE 1394) being advanced by companies in those industries will be used in navigation devices.

The Computer Group firmly believes that such a method will work without the need for government intervention. In the unlikely event that regulation is required, the Computer Group would support rules that are (a) narrowly drafted, (b) effective for the specific copy protection method, and (c) based upon a careful examination of any implicated technologies so as to ensure that the rules do not have unintended consequences. There is no proposed technical solution before the Commission at this time. Thus, even assuming the Commission has the legal authority to impose such a rule, it is clearly inappropriate for the Commission to act at this time.

## V. CONCLUSION

The Commission should not “clarify” the rules governing navigation devices to redefine “theft of services” to include devices that could be used to defeat or assist in defeating copy protection techniques employed by content providers. Acting on this request would require the Commission to resolve complex copyright issues for which it has neither the authority nor, in this proceeding, the record to act. Moreover, granting Time Warner’s request would have the effect of prohibiting all programmable computers, and perhaps other devices, from participating in the navigation device market. Finally, even if the Commission has the authority and the will

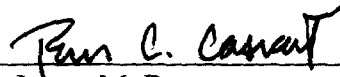
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<sup>17</sup> The copy protection method consists of self-protected data, i.e., using scrambling and encryption techniques. The method works because of patents and trade secrets allowing only authorized players or computers to play back the material. Thus, at least so far, government intervention has not been proven necessary to ensure the success of the copy protection method.

to act in this complex area, various industry members are currently working on copy protection techniques for digital transmission; it would be premature to act when a complete record may well show that government intervention is unnecessary and inappropriate.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I, Lissette Gonzalez, a secretary at Dow, Lohnes & Albertson, PLLC, do hereby certify that on this 23rd day of September, 1998, a copy of the foregoing "Opposition of Computer Industry Group to Time Warner Entertainment Company Petition for Partial Reconsideration" was sent by hand delivery where indicated and by first-class mail to the following:

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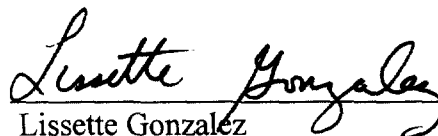
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